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No. 84-943

In the Supreme Court of the United States

OCTOBER TERM, 1984

ESTER ELVRUM, ET AL., PETITIONERS

v.

LEO WILLIAMS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF THE INTERIOR IN OPPOSITION

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QUESTION PRESENTED

Whether the Quileute Tribe has a sufficient property interest in the Quinault Reservation to qualify as a reservation tribe for the limited purposes of a now superseded version of Section 4 of the Indian Reorganization Act, 25 U.S.C. (1970 ed.) 464.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28) is reported at 742 F.2d 549. The opinion of the district court (Pet. App. B1-B5) is unreported. The opinion of the Interior Board of Indian Appeals (Pet. App. C1-C36) is reported at 8 I.B.I.A. 295.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 1984. The petition for a writ of certiorari was filed on December 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 4 of the Indian Reorganization Act as it stood at the time of the controlling events in this case, 25 U.S.C. (1970 ed.) 464, provided in relevant part:

> [N]o * * * devise * * * of restricted Indian lands * * * shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be * * * devised * * * to the Indian tribe in which the lands * * * are located * * *; and in all instances such lands or interests shall descend or be devised in accordance with the then existing laws of the State * * * in which said lands are located * * * to any member of such tribe * * * or any heirs of such member * * *.

STATEMENT

1. This litigation arises from the disapproval, by the Interior Board of Indian Appeals (IBIA), of the residuary clause in the will of Joe Willessi, a Quileute Indian. Willessi sought to devise his interest in an allotment of trust lands on the Quinault Reservation to another Quileute Indian, respondent Leo Williams. Although Willessi's will was originally approved in probate proceedings within the Department of the Interior, those proceedings were timely reopened in 1978 by petitioners, Willessi's heirs-at-law. Petitioners argued that the devise of the allotment on the Quinault Reservation to Williams was inconsistent with the restrictions on testamentary disposition of such lands imposed by Section 4 of the Indian Reorganization Act (IRA), 25 U.S.C. (1970 ed.) 464, because the respondent was neither an heir of the testator nor a member of the Quinault Indian Nation.[1] The central issue in the reopened administrative probate proceeding, and in the courts below, was whether, for the special purposes of Section 4 of the IRA, the Quileute Tribe had a sufficient interest in the Quinault Reservation to validate a devise of an interest in allotted trust lands located on the Quinault Reservation

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[1]Section 4 was amended in 1980. See Pub. L. No. 96-363, § 1, 94 Stat. 1207. See page 9, *infra*. The amended statute is not at issue in this case; in probate matters, the IBIA applies the law in effect on the date of the testator's death.

from one Quileute Indian to another Quileute who is neither the testator's heir nor lineal descendant.

2. The interests of Quinault and Quileute Indians in the Quinault Reservation may be traced through more than 100 years of federal tribal relations. In 1855, the United States entered into treaty negotiations with representatives of the Quinault, Quileute, Chehalis, Cowlitz, Chinook, and Quit Indians. The Quinault and Quileute Tribes relinquished all of their prior claims to land in the Olympic Peninsula and agreed to relocate to "a tract or tracts of land sufficient for their wants." Treaty of Olympia, July 1, 1855, art. II, 12 Stat. 971. In 1873, a 200,000-acre reservation was established by executive order "in accordance with the [Treaty of Olympia] * * * and to provide for other Indians in that locality * * *." Exec. Order of Nov. 4, 1873, *reprinted in*, I C. Kappler, *Indian Affairs, Laws and Treaties* 923 (1904). The Quileutes, however, refused to accept this reservation and stressed that "their interpretation of the treaty was that they were to be given a reservation where they had always lived at the mouth of the Quillehute River" (*United States* v. *Moore*, 62 F. Supp. 660, 668 (W.D. Wash. 1945), aff'd, 157 F.2d 760 (9th Cir.), cert. denied, 330 U.S. 827 (1946)). Further negotiations ensued and, by executive order in 1899, the United States granted the Quileute Tribe a reservation of its own near La Push, Washington. I C. Kappler, *supra*, at 923. Thereafter, the larger 200,000-acre reservation became known simply as the Quinault Reservation.

Article VI of the Treaty of Olympia foreshadowed the allotment era in federal Indian law by allowing parcels of land on the Quinault Reservation "to be surveyed * * * and assign[ed] * * * to * * * individuals or families as a permanent home * * *" (12 Stat. 972). In *United States* v. *Payne*, 264 U.S. 446 (1924), this Court held that Article VI of the Treaty complements the General Allotment Act, allowing the allotment of timberland, as well as grazing or

agricultural lands, on the Quinault Reservation. *Id.* at 448-449. Subsequently, in *Halbert* v. *United States*, 283 U.S. 753 (1931), the Court considered the Act of Mar. 4, 1911, ch. 246, 36 Stat. 1345-1346, which supplemented the General Allotment Act, authorizing

> all members of the Hoh, Quileute, Ozette or other tribes of Indians in Washington who are affiliated with the Quinaielt and Quileute tribes in the [Treaty of Olympia, to] * * * elect to take allotments on the Quinaielt Reservation rather than on the reservations set aside for these tribes: *Provided*, [t]hat the allotments authorized herein shall be made from the surplus lands of the Quinaielt Reservation after the allotments to the Indians thereon have been completed.

In *Halbert* the Court held that non-Quinaults who wished to take allotments on the Quinault Reservation but who did not reside on the Reservation were entitled to avail themselves of this allotment authorization. 283 U.S. at 762.

Allotment on the Quinault Reservation was ended by the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 461 *et seq.* Pursuant to a 1935 election, certain of the provisions of the IRA, including the restrictions on testamentary disposition in Section 4, were accepted on the Quinault Reservation. The Quinault Nation itself, however, chose not to adopt a formal constitution under Section 16 of the IRA, 25 U.S.C. 476, but has twice revised its 1922 by-laws and continues today as a sovereign "non-IRA" tribe. In contrast, the Quileute Tribe chose to reorganize and adopt a formal constitution pursuant to Section 16 of the IRA. Article I of the Quileute Constitution limits the Quileute's tribal jurisdiction to lands within the relatively small Quileute Reservation at La Push, Washington and to "such other lands, as may have been or may hereafter be added thereto" (E.R. 17). Article VII of the Quileute Constitution

describes the Tribe's powers over allotted lands and asserts power over allotments on the Quileute Reservation (E.R. 21).

3. In light of the special history of the Quileutes and Quinaults, the IBIA held that the Quileute Tribe did not exercise jurisdiction over the Quinault Reservation (Pet. App. C34). Because Section 4 of the IRA restricted devises of on-reservation trust allotments to members of the tribe "in which said lands are located," the IBIA concluded that the respondent, a member of the Quileute Tribe, could not take a trust allotment located on the Quinault Reservation (Pet. App. C1-C36). Respondent Williams filed an action for judicial review of the IBIA decision in the United States District Court for the Western District of Washington. The district court upheld the action of the agency (Pet. App. B1-B5).

The court of appeals reversed (Pet. App. A1-A28). The court held (*id.* at A15-A19) that the Quileute Tribe had property rights in the Quinault Reservation, traceable through the Treaty of Olympia and the implementing 1873 Executive Order, that qualified it as a "tribe in which the lands [devised to respondent Williams] are located" for the purposes of Section 4 of the IRA. The court of appeals concluded (Pet. App. A11-A14) that the legislative history of Section 4 of the IRA indicates that inheritance of restricted land was open to members of all tribes having property rights in a given reservation area.

ARGUMENT

While the judgment of the court of appeals is inconsistent with the result we urged below, we see no warrant for further review in this Court. The court of appeals' decision is exceedingly narrow: it merely holds that, for the purposes of a superseded version of Section 4 of the IRA, the Quileute Tribe has a sufficient property interest in the Quinault Reservation to allow its members to devise their trust

allotments on that reservation to one another. Although the panel's opinion does contain unnecessary and ambiguous dicta concerning shared Quileute *jurisdiction* over the Quinault Reservation, the panel was generally careful to limit its holding to the question of devisability of Quileute *property* interests under the former language of Section 4 of the IRA. There accordingly is no occasion for this Court to address the broad jurisdictional issues on which petitioners seek a ruling.

1. Petitioners argue (Pet. 16-24) that the court of appeals failed to acknowledge, and defer to, the recognition by Congress and the Department of the Interior of the Quinault Nation as the governing body on the Quinault Reservation. We disagree. The court of appeals' decision does not disturb the federal government's longstanding recognition of the Quinault Nation's exclusive political jurisdiction on the Quinault Reservation. The court of appeals stated (Pet. App. A23-A24) that its decision was based on the property rights of the Quileute Tribe, which would remain unaffected "[e]ven if the Quinault Tribe's rulemaking power were exclusive * * *." There is no basis, moreover, for petitioners' assertion (Pet. 16-18) that the court of appeals decided a nonjusticiable political question; the Secretary's rulings applying Section 4 are plainly judicially reviewable under the Administrative Procedure Act. In determining the rights of members of the Quileute Tribe, for the limited special purposes of Section 4 of the IRA, the court of appeals did not — and did not purport to — call in question the Executive Branch's recognition of the Quinault Nation. Cf. *Baker* v. *Carr*, 369 U.S. 186, 215-216 & n.43 (1962).[2]

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[2]Petitioners exaggerate (Pet. 19-20) the import of the court of appeals' assertion that it was empowered to review de novo all aspects of the IBIA's decision (Pet. App. A5). Despite this incautious language, the court of appeals actually devoted much of its opinion (Pet. App. A17-A22) to reciting congressional and executive branch actions regarding the Quinault Nation. Although the court ultimately minimized the weight to be accorded these past actions (Pet. App.

2. Petitioners also misportray the court of appeals' decision in an effort to demonstrate a conflict between the decision below and the Tenth Circuit's decision in *Southland Royalty Co.* v. *Navajo Tribe of Indians*, 715 F.2d 486 (10th Cir. 1983). *Southland Royalty* has no bearing on this case. That case involved neither Section 4 of the IRA nor the Quinault Reservation; rather, the Tenth Circuit held in *Southland Royalty* that the Navajo Tribe could tax oil and gas leases on its reservation without obtaining approval from the Secretary of the Interior. 715 F.2d at 489-490.

Petitioners argue (Pet. 29-33) that the court of appeals effectively stripped the Quinault Nation of its self-governing authority by suggesting that Secretarial approval of the Quinault's by-laws was required.[3] According to petitioners, this suggestion conflicts with the conclusion in *Southland Royalty* that non-IRA tribes need not obtain Secretarial approval of their tax laws. Although we share the petitioners' concern with the lack of clarity in footnote 5 of the Court's opinion, it is not even clear that the court of appeals meant to indicate that the Secretary's approval was needed to validate Quinault by-laws. See note 3, *supra*. At most, the passage of which petitioners complain may reflect the court's erroneous assumption that the Quinault Nation was required to reorganize under Section 16 of the IRA.[4]

A20-A21 n.4), the court of appeals simply did not ignore "the views of the United States" as the petitioners suggest (Pet. 20).

[3]The passage that gives rise to petitioner's concerns consists of the following sentence in a footnote in the opinion of the court below (Pet. App. A22-A23 n.5):

> We note also that the Quinault Indian Nation By-laws have not been approved by the Secretary of the Interior, although the IRA provision which permits tribes to adopt constitutions so requires.

[4]The court of appeals may have been confused by an erroneous statement in the IBIA's opinion suggesting that the Quinault Nation "adopted IRA organization in 1935" (Pet. C35). Compare page 4, *supra*. The court of appeals did not, in any event, state that the Quinault Tribe's by-laws are invalid.

But the footnote in question was merely an aside and the court of appeals plainly did not base its decision on any lack of self-governing authority in the Quinaults. To the contrary, the court explicitly stated (Pet. App. A22) that "*the Quinault Tribal Council's exercise of jurisdiction * * * to make and enforce rules * * ** does not foreclose the Quileute Tribe's property rights in the Quinault Reservation (emphasis added)." And the court underscored (*id.* at A24) that the Quileute's property rights, on which its ruling was based, could be recognized even if "the Quinault Tribe's rulemaking power were exclusive * * *." Thus the decision below in no sense conflicts with *Southland Royalty.*[5]

3. Petitioners seek certiorari primarily to explore a series of open-ended questions which, as even they concede (Pet. 38-40), the court of appeals did not address. These questions arise from the court of appeals' brief reference (Pet. App. A27-A28 & n.8) to shared Quinault-Quileute "jurisdiction" on the Quinault Reservation. In the context of this case, however, the allusion to Quileute jurisdiction — which was not necessary to the result below — does not warrant further review.

As discussed above, the court of appeals' decision rests upon its assessment of the historic property rights of the Quileute Tribe on the Quinault Reservation. The court of appeals considered these property interests sufficient to resolve the dispute in this probate proceeding; any comments regarding tribal jurisdiction are dictum. Accordingly, the court's passing reference to the issue of shared

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[5]In *Kerr-McGee Corp.* v. *The Navajo Tribe of Indians*, No. 84-68, this Court has granted certiorari (Oct. 9, 1984), to consider whether Secretarial approval is required to validate a non-IRA tribe's tax code. There is no reason to hold this case for No. 84-68. The court of appeals did not suggest that any action or law of the Quinault Nation was unenforceable. See page 7 note 3, *supra*.

jurisdiction does not preordain the jurisdictional confusion that the petitioners predict. Indeed, the court stated (Pet. App. A28 n.8) that it spoke of Quileute "jurisdiction" only "for IRA § 4 purposes." Given that Section 4 of the IRA was amended in 1980 to lessen the premium placed on tribal membership in probate disputes (see Pet. App. F9-F10 and page 2 note 1, *supra*), the impact of the court of appeals' decision, even on future probate disputes arising on the Quinault Reservation, is limited indeed. Plainly, this case provides no occasion for this Court to sort out questions regarding the political authority of tribes other than the Quinault over the Quinault Reservation.[6]

Respectfully submitted.

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[6]Petitioners seek to bolster their dire predictions regarding the impact of the court of appeals' opinion by quoting (Pet. 36) language from the United States' court of appeals brief warning of a "jurisdictional nightmare" on the Quinault Reservation. This warning was prompted largely by the request of the Chinook Indian Tribe, amicus curiae, that the court of appeals declare "that the only body which lawfully can exercise reservation-wide jurisdiction over the Quinault Indian Reservation is one in which the members of the eight tribes for which the reservation was created have an equal voice in its formation and operation" (Chinook Amicus Br. 18). Not only did the court of appeals *not* accede to this request, it specifically noted (Pet. App. A-28 n.8) that it did not even "consider * * * whether tribes other than the Quinault and Quileute also have jurisdiction over the Quinault Reservation for IRA § 4 purposes * * *."